TTDI JAYA SDN BHD v. YEW HONG TENG & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
PRASAD SANDOSHAM ABRAHAM JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: B-02(A)-1393-08-2015]
4 NOVEMBER 2016

CONTRACT: *Agreement – Sale and purchase agreement – Vacant possession – Purchasers accepted vacant possession despite defects found on property – Purchasers submitted complaint form in response to notice of delivery of vacant possession issued by developer – Purchasers claimed for rescission of sale and purchase agreement five years later based on allegation that developer failed to complete and deliver vacant possession – Whether claim supported by evidence – Whether vacant possession delivered – Whether there was total failure of consideration – Whether rescission of sale and purchase agreement appropriate remedy*

The first and second respondents ('the plaintiffs') entered into a sale and purchase agreement ('the SPA') with the appellant ('the defendant') for the purchase of a double-storey terrace house ('the property') at the price of RM476,024 ('the purchase price'). The defendant notified the plaintiffs that the property had been completed and was ready to be delivered to the plaintiffs. The plaintiffs accepted vacant and/or physical possession of the property and after inspecting the same, submitted a complaint form detailing 160 defects to the defendant. Remedial works were carried out by the defendant but the plaintiffs were not satisfied and refused to acknowledge and accept the defect works as having been satisfactorily done. However, the property was still registered in the names of the plaintiffs without their objections. After holding on to the property for about five years, the plaintiffs commenced an action at the High Court, seeking, *inter alia*, (i) a declaration that the defendant failed to complete and deliver vacant possession to the plaintiffs before the stipulated date under the SPA and, therefore, the SPA was rescinded; (ii) a refund of the purchase price; and (iii) damages for breach of contract. In allowing the plaintiffs' claim, the High Court held that the plaintiffs had the right to rescind the contract as there was a total failure of consideration. Hence, the present appeal by the defendant. The issues that arose for the court's adjudication were (i) whether there was total failure of consideration in respect of the SPA; and (ii) whether the plaintiffs could approach the court to seek remedy in the form of rescission of the SPA.

A **Held (allowing appeal)**
Per Asmabi Mohamad JCA delivering the judgment of the court:

(1) The plaintiffs submitted the complaint form two months after the defendant notified them that the property was completed and ready to be delivered to the plaintiffs. The plaintiffs had accepted vacant possession of the property as provided in the SPA and had even identified some 160 defects to be rectified by the defendant. If it was true that there was a total failure of consideration, a reasonable purchaser would have rejected the property at the outset and exerted his rights for a rescission of the SPA and not wait for several years to elapse before deciding to rescind the SPA and/or proceeded to fill up the complaint form to complaint about the defects to rectified by the defendant. (para 53)

(2) The plaintiffs' claim for rescission of the SPA was unsupported by contemporaneous documents and/or evidence. The plaintiffs claim was an afterthought as they (i) submitted the complaint form in response to the notice issued by the defendant that the property was ready for delivery of vacant possession; (ii) continued to repay the housing loan to their financier until the loan had been fully-paid and discharged form had been signed; (iii) paid all outgoings such as quit rent of the property, as required by the SPA; and (iv) consented for their names to be registered in the issue document of title to signify that they were the registered owners of the property. (para 54)

(3) The plaintiffs could not, at this stage, claim that there was total failure of consideration especially when they had sat on their rights to pursue a claim for rescission. Therefore, they were estopped from denying that they had taken vacant possession of the property pursuant to the SPA. The plaintiffs were deemed to have taken vacant possession of the property after receiving the defendant's notice. (paras 58 & 59)

(4) The plaintiffs did nothing to mitigate their losses. They were not satisfied with the rectification of defects by the defendant and had decided to abandon the property despite the same had been registered in their names. The plaintiffs ought not to have abandoned the said property but to mitigate their losses by engaging their own contractor to rectify the defects and charging the same to the defendant. The plaintiffs had only themselves to blame for not having occupied the property and/or having maintained it at all for ten years now. (para 72)

Bahasa Malaysia *Headnotes*

I Responden pertama dan kedua ('plaintif-plaintif') memeterai perjanjian jual beli ('PJB') dengan perayu ('defendan') bagi belian sebuah rumah teres dua tingkat ('hartanah') pada harga RM476,024 ('harga belian'). Defendan memaklumkan plaintif-plaintif bahawa hartanah tersebut

telah siap sedia untuk diserahkan kepada plaintif-plaintif. Plaintif-plaintif menerima milikan kosong dan/atau fizikal hartanah dan selepas memeriksanya, mengemukakan kepada defendan borang aduan yang menyenaraikan 160 kecacatan. Kerja-kerja pembaikan dijalankan oleh defendan tetapi plaintif-plaintif tidak berpuas hati dan enggan memperakui dan menerima bahawa kerja-kerja pembaikan dilakukan pada tahap yang memuaskan. Walau bagaimanapun, hartanah tersebut masih didaftarkan bawah nama plaintif-plaintif tanpa bantahan oleh mereka. Selepas memegang hartanah tersebut selama lima tahun, plaintif-plaintif memulakan tindakan di Mahkamah Tinggi bagi, antara lain, (i) satu deklarasi bahawa defendan gagal menyempurnakan dan menyerahkan milikan kosong kepada plaintif-plaintif sebelum masa yang ditetapkan oleh PJB dan oleh itu, PJB terbatal; (ii) pengembalian semula wang belian; dan (iii) ganti rugi pelanggaran kontrak. Dalam membenarkan tuntutan plaintif-plaintif, Mahkamah Tinggi memutuskan plaintif-plaintif berhak membatalkan kontrak kerana terdapat kegagalan balasan. Maka timbul rayuan ini oleh defendan. Isu-isu yang berbangkit untuk diputuskan oleh mahkamah adalah (i) sama ada terdapat kegagalan balasan dalam PJB; dan (ii) sama ada plaintif-plaintif boleh memohon remedi dalam bentuk pembatalan PJB di mahkamah.

Diputuskan (membenarkan rayuan)

Oleh Asmabi Mohamad HMR menyampaikan penghakiman mahkamah:

(1) Plaintif-plaintif menyerahkan borang aduan dua bulan selepas defendan memaklumkan mereka bahawa hartanah telah lengkap dan sedia untuk diserahkan kepada plaintif-plaintif. Plaintif-plaintif menerima milikan kosong hartanah seperti yang diperuntukkan dalam PJB bahkan mengenal pasti 160 kerosakan yang perlu diperbaiki oleh defendan. Jika benar terdapat kegagalan balasan, seorang pembeli munasabah akan menolak hartanah tersebut dari awal lagi dan menggunakan haknya untuk membatalkan PJB dan tidak menunggu beberapa tahun berlalu sebelum memutuskan untuk membatalkan PJB dan/atau terus mengisi borang aduan dan melaporkan tentang kerosakan yang perlu diperbaiki oleh defendan.

(2) Tuntutan pembatalan kontrak oleh plaintif-plaintif tidak disokong oleh dokumen semasa dan/atau keterangan. Tuntutan plaintif-plaintif adalah satu fikiran semula kerana mereka (i) menyerahkan borang aduan sebagai balasan kepada notis yang dikeluarkan oleh defendan bahawa milikan kosong hartanah sedia untuk diserahkan; (ii) terus membayar semula pinjaman perumahan kepada pembiaya hingga pinjaman dibayar sepenuhnya dan borang pelepasan ditandatangani; (iii) membayar semua

A bayaran pasti seperti cukai pintu hartanah, seperti yang diperuntukkan oleh PJB; dan (iv) membenarkan nama-nama mereka didaftarkan dalam isu dokumen hak milik untuk menunjukkan bahawa mereka adalah pemilik-pemilik berdaftar hartanah.

B **(3)** Plaintif-plaintif tidak boleh, di peringkat ini, menyatakan bahawa terdapat kegagalan penuh balasan khususnya apabila mereka sendiri lalai untuk menggunakan hak mereka menuntut pembatalan. Oleh itu, mereka diestop daripada menafikan bahawa mereka telah mengambil milikan kosong hartanah di bawah PJB. Plaintif-plaintif dikatakan telah mengambil milikan kosong
C hartanah selepas menerima notis defendan.

(4) Plaintif-plaintif tidak mengambil apa-apa tindakan untuk memitigasi kerugian mereka. Mereka tidak berpuas hati dengan pembaikan kerosakan oleh defendan dan memutuskan untuk
D meninggalkan hartanah tersebut begitu sahaja tetapi memitigasi kerugian mereka dengan melantik kontraktor sendiri untuk membaiki kerosakan dan mengecaj defendan. Plaintif-plaintif harus dipersalahkan kerana tidak menghuni hartanah tersebut atau menyenggaranya sama sekali selama sepuluh tahun.

E **Case(s) referred to:**

Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor [2011] 9 CLJ 133 FC ***(refd)***

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(foll)***

F *Bousted Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC* ***(refd)***

Chase Perdana Bhd v. Md Affendi Hamdan [2009] 6 CLJ 501 FC ***(dist)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Golden Quantum Acres Sdn Bhd v. SSU Management Services Sdn Bhd [2014] 10 CLJ 320 HC ***(refd)***

G *KLC Placement Services Sdn Bhd & Anor v. Balakrishna Polanaido [2014] 1 LNS 1108 HC* ***(refd)***

Kris Heavy Engineering & Construction Sdn Bhd v. Mah Sing Properties Sdn Bhd [2011] 1 LNS 572 HC ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

H *Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***

Lim Chee Yong & Anor v. Lee Boon Su & Anor [2013] 1 LNS 642 HC ***(refd)***

Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Mok Yii Chek v. Sovo Sdn Bhd & Ors [2015] 1 LNS 448 HC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ
I *133; [1990] 2 CLJ 635 HC* ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56(1)

For the appellant - Tan Ru En; M/s Che Mokhtar & Ling
For the respondents - Raymond Mah, Adi Farris & Ravin Woodhull; M/s Mah Weng Kwai & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: AT2-24-2070-2009 (overruled)]

Reported by Najib Tamby

JUDGMENT

Asmabi Mohamad JCA:

Introduction

[1] This was an appeal against the decision of the learned High Court Judge ("the High Court") dated 23 July 2015, which allowed the respondents' claim against the appellant in the following terms:

(a) A declaration that the defendant had breached the sale and purchase agreement dated 23 December 2002 (the "SPA") for the purchase of a double storey terrace house end lot known as HS(D) 159114, Lot 26529, Mukim Damansara, Daerah Petaling, in the State of Selangor, measuring 4,735 square feet ("the said property") and for the said SPA to be rescinded;

(b) A refund of the full purchase price in the sum RM476.024 which had been paid by the respondents to the appellant with interest at the rate of 8% per annum from 24 December 2004 to 31 July 2012 and interest at the rate of 5% per annum from 1 August 2012 to final settlement;

(c) Damages at the rate of 10% per annum based on RM476.024 from 24 December 2004 to the date of the rescission of the sale and purchase agreement, being the date of the judgment of the High Court on 23 July 2015;

(d) For a consequential order that upon the satisfaction of the judgment, the plaintiff shall execute the transfer of the property to the defendant and the defendant to bear the cost of the transfer; and

(e) Costs of RM80,000 to be paid by the defendant to the plaintiffs.

[2] The respondents here were the plaintiffs in the High Court while the appellant here was the defendant therein. For easier reference, the parties would be hereinafter referred to as "defendant" and "plaintiff" respectively.

Brief Background Facts

[3] The first and second plaintiffs entered into the SPA with the defendant, a housing developer (see pp. 705-747 core bundle Part C – Jilid 1) for the purchase of the said property.

[4] Pursuant to the SPA, the defendant was supposed to deliver vacant possession within 24 months from the date of the SPA, ie, on or before 23 December 2004.

[5] The purchase price of the said property was RM476,024, which had to be paid by way of progress payments in accordance with the SPA. The purchase price had been fully paid by the plaintiffs.

[6] On 29 September 2004, the defendant wrote to the plaintiffs to notify the plaintiffs that the property had been completed and was ready to be delivered to the plaintiffs (see pp. 769-770 core bundle Part C – Jilid 1).

[7] Pursuant to the said notice, on 8 November 2004 the plaintiffs had accepted vacant and/or physical possession of the said property, inspected the said property and thereafter submitted the complaint *vide* Complaint Form No. 01463 dated 10 November 2004, detailing 160 defects found in the said property to be rectified by the defendant (see pp. 771-810 core bundle Part C – Jilid 1).

[8] Upon receiving the said complaint form, the defendant instructed its architect and contractor to attend to the defects. A "Notice For Completion of Defect Works" dated 20 June 2005 had been submitted by the contractor to the defendant stating that most of the defect works on the said property had been completed (see pp. 811-813 of core bundle Part C – Jilid 1). However, there were some minor works which were still outstanding.

[9] However, the plaintiffs were not satisfied with the remedial works purportedly done by the defendant and refused to acknowledge and accept the defect works as having been satisfactorily done.

[10] The property was registered in the names of the plaintiffs without the plaintiffs' objection and the plaintiffs continue to be the registered owners of the property for more than ten years now.

[11] On 2 September 2009, after holding on to the said property for about five years, the plaintiffs commenced an originating summons, amongst others, seeking for the following orders:

(a) A declaration that the defendant had failed to complete and deliver vacant possession to the plaintiffs before 23 December 2004 in accordance with the SPA and therefore the SPA was rescinded.

(b) The defendant to refund the plaintiffs the sum of RM476,024, being 100% of the purchase price which had been fully paid by the plaintiffs to the defendant.

(c) Damages at 10% per annum calculated from the purchase price of RM476,024 from 24 December 2004 until full realisation of the judgment sum, being paid to the plaintiffs and/or in the alternative, the damages to be assessed by the court so as to enable the plaintiffs to be reinstated to the position as if the SPA had not been executed;

(d) Further/alternatively, damages for breach of contract or exemplary damages; and

(e) Interest at the rate of 8% per annum from 24 December 2004 till final realisation and costs.

[12] The defendant had applied to convert the originating summons into a writ and this was disallowed by the High Court on 19 July 2010. The defendant was directed by the High Court to file its affidavit in reply on 9 August 2010 and the same was filed on 25 November 2011 after leave for extension of time was granted by the court. On 28 June 2012, Her Ladyship Justice Hadhariah binti Syed Ismail heard the originating summons and dismissed the originating summons.

[13] Aggrieved by the decision of the High Court to dismiss the originating summons, the plaintiffs appealed to the Court of Appeal. The Court of Appeal had on 15 August 2013 allowed the appeal and set aside the High Court's order and remitted the matter to the High Court for the same to be converted into a writ and be heard by a different judge (see pp. 30-31 of core bundle, Part A).

[14] The matter proceeded for trial as directed by the Court of Appeal, with 12 witnesses having testified for the plaintiffs and four witnesses testified for the defendant. After the full seven days trial, the High Court had on 23 July 2015 allowed the plaintiffs' claim and ordered as stated in para. (1) of this judgment.

[15] Aggrieved by part of the decision of the High Court, the defendant filed an appeal to this court. The defendant had complied with the judgment dated 23 July 2015 by paying under protest the sum of RM1,472,441.92 (inclusive of costs of RM80,000) to the respondents in return of the said property's original document of title.

The Issues Before The High Court

[16] There were many issues that were posed for the court's determination as shown in "Isu-Isu Untuk Dibicarakan" (see pp. 47-50 of the joint core bundle (Part A)). However, the primary issue that was considered by the High Court Judge was whether the defendant had been in fundamental breach of the SPA, such that the plaintiffs could seek the reliefs claimed in the originating summons.

Findings Of The Learned Judge

[17] Having proceeded with the *viva voce* proceedings, the High Court made the following findings:

(a) The breaches complained of were thus defects, cracks, ground settlement, electrical problems, encroachment, breach of SPA in constructing the property different from the building plans. This was supported by the evidence of PW1, PW2, PW7, PW8, PW9 and PW11;

(b) The electrical wiring for the said property was not done in accordance with the Electricity Supply Act 1990. The wiring could not be rectified but has to be redone. There were problems with the water heater points but there was no problem for the light, fan or air-conditioner.

(c) The findings on electrical works were based on the report prepared by PW6 dated 15 April 2009, who had based his report on his review of the plaintiffs' letter dated 16 September 2005 to the defendant, photographs of the electrical work supplied by the plaintiffs as well as the 4th Schedule of the SPA. PW6 had no benefit of physical inspection of the property. Beside the abovementioned report, the High Court had also relied on and PW6's second report dated 20 June 2014 which was prepared by PW6 upon his physical examination of the property on 17 June 2014. The report dated 15 April 2009 was not confirmed by TNB (p. 8 of the grounds of judgment (Supplementary Appeal Record (Part A)).

(d) There was no evidence from the defendant to refute the evidence of the plaintiffs through PW1 to PW9, PW11 and PW12 on the defects, cracks, settlement and encroachment except for its reliance on the issuance of the CF and vacant possession.

(e) On the construction of the property different from the building plans as stated in the SPA, the High Court found that the second schedule to the SPA (p. 722 of Ikatan Teras Bersama (Bahagian C – Jilid 1) had referred to MBSA/B/PC/SEK: U2/119-2002 and this differed from that which was declared by the architect in Borang E; MBSA/B/TP/SEK: U2/629-2002 (see p. 767 Ikatan 9 Teras Bersama (Bahagian C – Jilid 1). This was also different from the advertisement and sale permit as shown in the brochure (see pp. 748-751 (Ikatan Teras Bersama (Bahagian C – Jilid 1). The High Court found that the amendments to the building plans amounted to a breach of the SPA by the defendant.

(f) The evidence of PW10 would have to be examined in its totality. Although PW10 had stated CF had been issued and there was nothing wrong with the project and the project was safe, the inspection process in the issuance of the CF was done randomly and may be (words used by the High Court) MBSA had not inspected the plaintiffs' house. There could still be safety concern on the plaintiffs' property despite issuance of CF due to random inspection and the limited scope of renovation (see p. 14 of the grounds of judgment (Supplementary Appeal Record (Bahagian A)).

(g) Vacant possession was not in compliance with the SPA as it was not supported by certificate signed by the defendant's architect certifying that the property had been constructed and completed in accordance

with the relevant Acts, by laws and regulations and all conditions imposed by the appropriate authority in respect of the issuance of CFO had been duly complied with.

(h) With regards to the rectification works, there was no certification by the architect that the defects had been rectified completely. There was no evidence that the defects had been rectified.

(i) Given the defects, cracks and settlement and electrical problems as well as encroachment, the plaintiffs were in no position to accept the property thereby leading to a total failure of consideration.

(j) Based on the foregoing the High Court decided that the plaintiffs had the right to rescind the contract.

(k) Having ruled that there was total failure of consideration which warranted a rescission of the SPA, the High Court proceeded to grant a refund of the purchase price in the sum of RM476,024 with pre and post interest of 8% and 5% respectively and damages at the rate of 10% per annum based on RM476.024 from 24 December 2004 to the date of the order for the rescission of the SPA.

Issues Raised By The Respective Parties

[18] Both learned counsel agreed there were many issues that were posed for the court's determination as shown in "Isu-Isu Untuk Dibicarakan" (see pp. 47-50 of the joint core bundle (Part A)). However, as mentioned earlier, the primary issue as ruled by the learned High Court Judge was whether the defendant had been in a fundamental breach of the SPA, such that the plaintiffs could seek the relief claimed in the originating summons.

[19] For the sake of completeness, we would attempt to summarise the arguments of the respective parties before delving into the core issue which we would consider in the later part of this judgment.

For The Defendant

[20] Amongst others, the defendant had raised the following arguments in its written submission:

(a) The property was fit for occupation, there was no total failure of consideration to warrant the learned judge to grant a rescission of the said SPA.

(b) Further, even assuming that there was a total failure of consideration, which was denied by the defendant, and the said property was not fit for occupation, the learned judge erred in law and fact for not considering that the plaintiffs had allowed the effluxion of time to pass by failing to exercise their rights to rescind the said SPA *ab initio*.

(c) The plaintiffs had by their conduct and further supported by contemporaneous documents, chosen to affirm the terms and conditions of the SPA by complying with the same, as purchasers who were deemed to have accepted the delivery of vacant possession would have done. The conduct of the plaintiffs to hold on to the said property with registered ownership for more than ten years did not justify the grant of the order of the rescission of the SPA in their favour.

(d) The grant of damages by the learned judge was not in consonant with the grant of rescissions as the alleged losses suffered by the plaintiffs were not proven. Neither were these damages particularised with precise details in terms of figures.

(e) The award of damages at the rate of 10% per annum from 24 December 2004 till the date of the order of rescission which was made on 23 July 2015 was not supported by evidence.

(f) Although the plaintiffs suffered losses as claimed, they had failed to mitigate their losses under the SPA and had allowed their losses to escalade by filing their case only on 2 September 2009, about five (5) years after they had submitted the complaint form dated 10 November 2004.

For The Plaintiffs

(a) The learned judge was correct in her finding that there was misrepresentation by the defendant. This was not challenged by the defendant in the memorandum of appeal.

Therefore on this ground alone, the appeal was bound to fail.

(b) The property that was sold to the plaintiffs was different from the one that was advertised or identified in the sale permit as shown in the defendant's brochure ("exh. B50"). The learned judge's reasoning could be gleaned from paras. 23 and 24 of the grounds of judgment. The gist of the reasoning was:

(i) the second schedule of the SPA had referred to MBSA/B/PC/SEK: U2/119-2001 (see Ikatan Teras Bersama (Bahagian C – Jilid 1)) which was different from that which the architect had declared in Borang E (B6 81) MBSA/B/TP/SEK:U 2629-2002 (see Ikatan Teras Bersama (Bahagian C – Jilid 1)).

(ii) it was also different from that in the advertisement and sale permit as shown in (see pp. 748-751 Ikatan Teras Bersama (Bahagian C – Jilid 1)).

(iii) even if the contention of the defendant was that the amendment to the plans had been approved by the MBSA, this did not absolve the defendant from seeking the consent of the plaintiffs to the amendments before the same were acted upon. The evidence of the

plaintiff's witness (PW10), the Director of Building MBSA, was that MBSA did not instruct the changes but the same was ordered by the defendant. Thus this amounted to a breach of the SPA.

(iv) the property was different from what has been advertised by the defendant to the property as stated in the sale permit. In view of this, the plaintiffs contended that there was misrepresentation by the defendant. Therefore, the plaintiffs were entitled to the remedy for rescission of the SPA.

(v) the learned judge was right in her ruling that the primary issue for determination was whether the defendant had committed a fundamental breach of the SPA. This was relevant when the defendant changed the design of the property as stated in the first set of plans without first obtaining the consent of the plaintiffs. The property ought to have been constructed in accordance with the first set of plan as approved by the authorities.

(vi) the defendant had breached the terms of the SPA by failing to construct the property in accordance with good engineering practice. Due to this, ground settlement and large cracks appeared around the property.

(vii) there were serious electrical problems within the property as the defendant had failed to conform to the Electricity Supply Act 1990 of the SPA. Clause 20 of the SPA had not been complied with.

(viii) the property constructed by the defendant had encroached into adjoining property (Lot 7536) as the property was constructed outside the boundary of the land which was allocated to the plaintiffs. The wall was built on the adjoining property.

(ix) the defendant had failed to show proof that prior approval of the controller had been obtained to allow for any variation of the particulars stated in the advertisement or the sale permit which was first granted.

[21] The expert evidence was not challenged. 12 expert witnesses were called to prove that the property was not constructed according to the first set of plans but instead the design was modified without the plaintiffs' consent as well as that of the relevant authorities.

[22] The defects to the property were never rectified by the defendant despite the same having been identified and notified to the defendant *vide* Complaint Form No. 01463 dated 10 April 2014.

[23] To date, no architect's certificate had been issued to state that the property has been duly constructed and completed in accordance with the relevant applicable laws, by-laws and regulations. Therefore, the defendant could not and did not deliver vacant possession of the property to the respondent as required under cl. 23(2) (a) of the SPA.

[24] The defendant's failure to deliver vacant possession of the property with the architect's certificate amounted to a total failure of consideration. As the construction of the property was not in accordance with the relevant laws, by-laws and regulations, it must be taken that the promise by the defendant had not been fulfilled in its entirety. This being the position, the learned judge had correctly rescinded the SPA and awarded damages to the plaintiffs. The defendant had agreed to the rescission of the SPA.

[25] With respect to damages the plaintiffs claimed that they were entitled to liquidated damages calculated at the rate of 10% per annum of the purchase price from the date vacant possession ought to have been delivered from 23 December 2004 to 31 July 2012 with interest at 8% per annum, and thereon interest at the rate of 5% per annum from 1 August 2012 until final settlement. This remedy was clearly provided in cl. 22(1) of the SPA.

Discussions Of The Issues And Decision Of The Court

[26] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court at the first instance.

[27] In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[28] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and the established evidence.

[29] Guided by the above established principle, we had therefore carefully examined the documents that were placed before us in the form of the record of appeal to ascertain if the learned High Court Judge had arrived at her decision correctly on the basis of the relevant law and evidence before her.

[30] We had seriously considered all the arguments raised by the respective parties both in their written as well as oral submissions on 10 March 2016 and 11 March 2016 respectively. We had also perused all the relevant documents tendered during the trial. Having heard the respective arguments we had adjourned the case for the decision at a later date to be fixed and invited both the learned counsels to further submit on the core issue by way

of written submission to be submitted to our respective secretaries within one week from 11 March 2016. Both the learned counsel had adhered to our request and the additional submissions were handed as requested.

The Core Issue

[31] We have attempted to illustrate the factual matrix of the case at hand under the heading of "brief background facts". The core issue which arose before us was "whether based on the factual matrix of this case, where vacant possession had been delivered and the property duly registered in the name of the plaintiffs, the plaintiffs could approach the court to seek for a remedy in the form of rescission of the SPA and whether the reliefs granted by the learned High Court Judge as stated in para. 1 were appropriate and in accordance with the law".

Was There Total Failure Of Consideration In Respect Of The SPA?

[32] By their prayer (a) of the originating summons, the plaintiff had sought for a declaration that the defendant had failed to complete and deliver vacant possession to the plaintiffs before 23 December 2004 in accordance with the SPA and for the SPA to be rescinded. A perusal of the grounds of judgment would show that the learned judge had granted the prayer sought because the property suffered defects, cracks and settlement and electrical problems and encroachment. The learned judge was of the view that plaintiffs were in no position to accept the property thereby leading to a total failure of consideration. Under the circumstances, the learned judge made an order for the SPA to be rescinded.

[33] The question which we have to consider was whether the High Court was right in finding that there was total failure of consideration in respect of the SPA. The law with regards to rescission of contract, the general principles applicable to rescission of contract and effects of rescission of contract had been well illustrated in a plethora of cases which both parties had put before us. We would attempt to discuss these cases in this judgment. However, before we delve into these cases, it would be appropriate at this juncture for us to examine ss. 40 and 56 of the Contracts Act 1950 ("CA") as these two provisions of the CA were relevant to the factual matrix of this case.

[34] Section 40 provides as follows:

> Effect of refusal of a party to perform promise wholly
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[35] The next provision is s. 56(1) which reads:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[36] Section 40 of the CA provides that if a party to a contract had refused and/or disabled himself from performing a contract in its entirety the other party to the contract has an option to put an end to the contract, unless if it could be shown that the other party had either by clear words or conduct or acquiescence wishes to continue with the contract. It could be gleaned from s. 40 of the CA that the use of the phrase in its entirety indicates the extent of the breach. In gist the section envisages a situation the contract breaker must have "refused to perform … his promised in its entirety" before any action may be taken by the promisee to put an end to the contract.

[37] Section 56(1) of the CA uses the phrase fails to do any such thing at or before the specified time. The use of this phrase is "to describe the nature of the breach which would bring a particular fact pattern within it to make a contract voidable" (see the case of LSSC at p. 446).

[38] Besides the above provision of the CA, we had also referred to the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 ("*Berjaya*") where the above provisions of the CA had been dealt with by the Federal Court. In *Berjaya*, a purchaser had entered into an agreement with a developer to purchase a shop lot. Pursuant to the agreement, the developer was supposed to deliver the lot within a certain time, failing which the developer had to pay liquidated damages. The developer had failed to deliver the shop lot within the stipulated time stated in the agreement. The purchaser then issued a termination notice but at the same time proceeded to negotiate with the developer. As a result of the negotiation, the purchaser agreed to give a few extensions to the developer to meet with its obligation under the agreement. Despite the extension of time having been given, the developer still failed to complete the project. The purchaser then demanded the return of all sums paid to the developer and commenced legal action. The developer refuted the claim and stated that given the factual matrix of the case, the purchaser was only entitled to liquidated damages and nothing more.

[39] In the above case, both at the High Court and the Court of Appeal found in favour of the purchaser. When the case proceeded to the Federal Court, the Federal Court had reversed the decision. His Lordship Zulkefli Makinudin FCJ explained as follows at p. 277:

As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case s. 56(1) should be read together with s. 40 of the Act in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. *A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration.* What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the SPA. *Indeed the facts before the court showed that the construction of the property was completed and was in the state of delivery to the respondent. It is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD* as agreed upon in the SPA and that the respondent has no right to rescind the SPA. (emphasis added)

[40] In the same case, His Lordship Gopal Sri Ram FCJ had discussed the principles and the law relating to rescission of contract where His Lordship had stated at pp. 609, 610, 611 and 612 as follows:

In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 48, Viscount Simon LC said:

... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled ...

[18] What has to be added to the learned Lord Chancellor view is the qualification:

... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract... but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due (Stocznia Gdanska SA v. Latvian Shipping Co & Ors [1998] 1 All ER 883 per Lord Goff of Chieveley).

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety.

...

A *In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party.*

But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages.
B *What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See ss 34-37 of the Specific Relief Act 1950.*

...

C Section 40 [CA] is a restatement of the English common law position.

...

In my judgment, s 56(1) should be read together with s 40 of the Act when determining whether a promisor has committed a breach of such a nature that goes to the root of the contract. This is sometimes described as a fundamental breach.
D

(emphasis added)

[41] What then is the meaning of total failure of consideration? This subject had also been illustrated in the case of *KLC Placement Services Sdn Bhd & Anor v. Balakrishna Polanaido* [2014] 1 LNS 1108:

E 22. The judgment of the Court of Appeal in *Tan Ah Thong v. Chee Pee Saad & Anor and Other Cases (Consolidated)* [2010] 6 CLJ 560 is instructive for its clarification of the doctrine of total failure of consideration. The Court said:

… that failure of consideration does not depend upon the question
F whether the promisee has or has not received anything under the contract…but rather *whether the promisor has performed any part of the contractual duties in respect of which the payment is due.* (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 All ER 883, per Lord Goff of Chieveley)

In other words, when deciding whether there has in a given case total
G failure of consideration, the court must *first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety.*

H The plaintiffs were Polish shipbuilders. They entered into several agreements to design, build, complete and deliver ships for the second defendant, a wholly-owned subsidiary of the first defendant. Payment was to be made in instalments. The defendants defaulted and the plaintiffs held them in breach. They sued to recover damages for breach of contract. The defendants argued that that there was a total failure of
I consideration as they had received no vessel from the plaintiffs. The House of Lords held that the plaintiffs' promise when properly construed was not merely to deliver the ships but to also design them. This latter part of the promise the plaintiffs had performed. There was accordingly no total failure of consideration.

[42] His Lordship Gopal Sri Ram JCA had also delved with the doctrine of repudiation in great detail in the case of *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434 at p. 441 where it was held:

> [2] Now there is another way of putting across the doctrine of repudiation. If a promisor does not perform his promise, the promisee may terminate the contract. This right of termination was referred to by the common law lawyers of the 19th Century as the right to rescind. Some lawyers continue to use the word rescind in this sense. Professor G.H Treital is one. See, Trietal's *"Law of Contract"*, (11th Edn). But this rescission is very different from the specific relief of rescission invented by the Court of Chancery. The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected. But that is not. So in the case of equitable remedy of rescission, which, when exercised, restores the parties to the same position as though the contract was never made. In other words, there is *restitutio in integrum.* Where it is impossible to restore the *status quo ante*, the court may grant equitable compensation. This is what happened in *Longstaff v. Birtles* [2001] ECWA (Civ) 1219, a case involving breach of fiduciary duty.

[43] His Lordship went further to say:

> [4] **That there must be a total failure of consideration before the limited common law right to rescind may be exercised** is borne out by the following passage at p. 502, para. 20-007 in *"The Law of Restitution"* (6th edn) by Goff & Jones which is the leading text on the subject:
>
> A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.' (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26]. *The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed; if the consideration has partially failed, his only action is for damages.* (emphasis added)

[44] Whether the test "total failure of consideration is correct test in law of contract?" had been delved in *Mok Yii Chek v. Sovo Sdn Bhd & Ors* [2015] 1 LNS 448 where the court held:

> As a matter of *stare decisis*, I am bound to follow *Berjaya Times Square Sdn Bhd*. Having said that, Tan Sri Visu Sinnadurai expressed the following view in his treatise, *"Law of Contract"*, 4th Edition (2011), at p. 1039 and 1042:
>
> The doctrine of total failure of consideration rightly belongs to the realm of the law of restitution (See Goff & Jones, *The Law of Restitution* (7th Edn). See also Chitty and Treitel above) ...

A It is quite clear from the discussion above that the Federal Court in *Berjaya Times Square* went off tangent when it based its decision on the concept of total failure of consideration in a case dealing with the general principles of the laws of contract and not one on the law of restitution.

In conclusion it is submitted that the doctrine of total failure of
B consideration generally has no place in the area of breach of contract. It has limited application only in cases where the action is based on restitutionary relief, ie, where an innocent party seeks recovery of monies paid and not in for a claim in damages for breach. In all other cases of breach, the traditional test as employed by Malaysian and English cases, ie, 'fundamental breach', has no place in cases dealing with time such as
C Berjaya Times Square. It is hoped that the opportunity will soon arise for the Federal Court to revisit its decision in *Berjaya Times Square* and restate the correct position of the law. Uncertainties in the law cause discomfort to businessmen and lawyers alike.

[45] Notwithstanding the observation made by the learned author in his
D treatise the *"Law of Contract"*, like the learned judge in *Mok Yii Chek v. Sovo Sdn Bhd & Ors (supra)*, we are constraint by the doctrine of *stare decisis* to follow *Berjaya*. Thus, as the law stands the proposition of law regarding the right to rescission under contract was clearly stated in *Berjaya* where it would only be allowed by the court if it could be shown that there was total failure
E of consideration.

[46] Turning now to the factual matrix of the case. The question which we need to ask was whether there was total failure of consideration to entitle the plaintiffs herein to a rescission of the SPA. In this case, the defendant had fully completed the said property according to the Amended Building Plan
F MBSA/B//TP/SEK: U/639-2002 which had replaced the earlier building plan. This was consented to by the first plaintiff, who despite having knowledge about the amendments proceeded to sign the SPA. Further the amended building plan was approved by Majlis Bandaraya Shah Alam (MBSA) and a certificate of practical completion had been issued by the
G relevant authority on 5 July 2004. The above facts were supported by the following:

(a) The High Court found that the amendments of the building plan had been approved by the MBSA and there was no challenge to the amendment by the plaintiffs (see para. 23 of the ground of judgment
H (see p. 13 rekod rayuan tambahan (Bahagian A));

(b) The evidence of PW10 (see notes of proceedings at p. 339 of Ikatan Teras Bersama (Bahagian B) Jilid 1) disclosed that the project was validly approved;

I (c) The certificate of practical completion dated 5 July 2004 had been issued by the relevant authority (see p. 758 of Ikatan Teras Bersama (Bahagian C) Jilid 1);

(d) The certificate of fitness dated 22 September 2004 was issued by MBSA (see p. 759 to 760, letter dated 6 September 2004 of Ikatan Teras Bersama (Bahagian C) Jilid 1);

(e) Borang E dated 6 September 2004 sent to the plaintiffs notifying the plaintiffs that the property had been completed and ready for delivery of vacant possession (see p. 767 Ikatan Teras Bersama (Bahagian C) Jilid 1); and

(f) Evidence of PW10, Notes of Proceedings at pp. 345 to 346 Ikatan Teras Bersama (Bahagian C) Jilid 1.

[47] It was also not disputed that the permanent certificate of fitness issued by the proper authority was also annexed to the letter dated 29 September 2004 which was sent to the plaintiffs notifying the plaintiffs that the said property had been duly completed and was fit for occupation (see pp. 769 to 770 of Ikatan Teras Bersama (Bahagian C) Jilid 1). The plaintiffs were requested to take possession of the said property. This letter was received by the plaintiffs who had accepted delivery of vacant possession, proceeded to inspect the property and submitted their list of defects to the defendant for the same to be rectified (see pp. 771-810 Ikatan Teras Bersama (Bahagian C) Jilid 1).

[48] It was the contention of the plaintiffs that they had not been issued with the architect's certificate along with the letter dated 29 September 2004 notifying them that the property was completed and ready for delivery of vacant possession. We were of the view that the failure on the part of the defendant to provide the architect's certificate at the time 29 September 2004 letter was issued, did not tantamount to a fundamental breach of the SPA as claimed by the plaintiffs. We said this because the permanent certificate of fitness had been issued by MBSA to the plaintiff informing them the said project was fit for occupation, which included the property. Further the plaintiffs had at no time objected to this at the time they accepted delivery of vacant possession. The plaintiffs had gone ahead to inspect the property and submit their complaints of the defects to be rectified *vide* Complaints Form No. 01463. The learned judge's reliance on the case of *Chase Perdana Bhd v. Md Affendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783 was misplaced as the facts of that case could be distinguished from the current case where the title of the said property was registered in the name of the plaintiffs for some years and the certificate for fitness had been issued.

[49] The factual matrix of the case at hand was somewhat similar to the facts in the case of *LSSC Development Sdn Bhd (supra) (LSSC)* where the property in LSSC, a bungalow had been transferred to the plaintiff (purchaser) after the period of 24 months as provided in the sale and purchase agreement without water, electricity or certificate of fitness. The Court of

A Appeal had rejected the argument of the plaintiff that the defendant had breached the sale and purchase agreement as it had failed to deliver the house with water, electricity and the certificate of fitness within the timeframe provided in the agreement. The Court of Appeal had ruled that to warrant a rescission of the contract, the contract breaker "must have refused to B perform … his promise in its entirety" before "the promisee may put an end to the contract". The Court of Appeal went on to say that the right to a rescission being a creature within the common law had been reproduced in our CA by way of s. 56(1). Guided by the above authority, both ss. 40 and 56(1) of the CA must be read together in order to ascertain whether the C defendant herein had refused to perform its promise in its entirety by failing to do the things it had promised to do under the SPA within the stipulated time.

[50] Based on the facts as illustrated above, the property had already been registered in the plaintiffs' names approximately three years before the D plaintiffs approached this court seeking for a rescission of the SPA. The plaintiffs had full control of the property but chose to abandon it. In view of the above, the defendant could not be said to have failed to perform its promise in its entirety by failing to do the things it had promised to do pursuant to the SPA. Further the property was delivered within the stipulated E time provided in the SPA.

[51] On examining the factual matrix of the instant case, the fact that the relevant authority had issued the permanent certificate of fitness, for all intent and purposes, the property was safe for occupation (see the evidence of PW10, the Director of MBSA in answering the query by the learned judge F in the notes of proceedings at p. 345 & 346 of Ikatan Teras Bersama (Bahagian C) Jilid 1). Hence, could the defendant then be said to have refused to perform its promise under the SPA in its entirety?

[52] We were of the view that the learned judge's findings at para. 25 of the grounds of judgment was based her own assumption which was not G supported by evidence. The learned judge said:

> Although she (PW10) had stated as CF had been issued there is nothing wrong with the project and the project is safe, the inspection process in the issuance of the CF meant not all the houses in the project had been inspected and it was done at random **and may be** MBSA had not H inspected Plaintiff's house and if the project title is wrong a new one can be issued with the right title as replacement and if CF is issued and a building is found to be dangerous the CF would still not be revoked … Hence there can still be safety concerns on Plaintiff's Property despite the issuance of CF due to the random inspection and the limited scope for renovation. (emphasis added).

I (see p. 14 of Rekod Rayuan Tambahan (Bahagian A)).

[53] The High Court had also failed to consider the conduct of the plaintiffs in submitting their complaints form dated 10 November 2004 which was done about two months after the defendant's letter dated 29 September 2004 had been issued notifying them that the property was completed and ready to be delivered to the plaintiffs. There was clear evidence that the plaintiffs had accepted vacant possession of the property as provided in the SPA and had even identified some 160 defects to be rectified by the defendant. If it was true, as claimed by the plaintiffs that there was total failure of consideration, a reasonable purchaser would have rejected the property at the outset and exerted his rights for a rescission of the SPA and not wait for several years to elapse before deciding to rescind the SPA and/or proceeded to fill up the complaints form to complain about the defects to be rectified by the defendant.

[54] There were overwhelming evidence before the learned judge that the plaintiffs' action to claim for a rescission of the SPA was merely an afterthought, unsupported by contemporaneous documents and/or evidence. The following conduct would strengthen our findings that this was merely an afterthought and was introduced by the plaintiffs at this late stage to justify their claim for a rescission of the SPA:

(a) The plaintiffs had submitted the complaint forms *vide* Complaints Form No. 01463 in response to the notice issued by the defendant that the property was ready for delivery of vacant possession;

(b) The plaintiffs continued to repay the housing loan to their financier, Maybank until the loan had been fully paid and discharged form had been signed;

(c) The plaintiffs had paid all outgoings such as quit rent of the said property as required under the SPA; and

(d) The plaintiffs consented for their names to be registered in the issue document of title to signify that they are the registered owners of the property. They continue to be registered owners of the property up to now and three years preceding the commencement of this action.

(see p. 716 & p. 713, of Ikatan Teras Bersama (Bahagian C) Jilid 1, – Clause 25(1) of the SPA; p. 421 of Ikatan Teras Bersama (Bahagian B) Jilid 2, paras. 54 to 62 of defendant's written submission dated 22 May 2015 at pp. 1493 to 1494 of rekod rayuan (Bahagian C) Jilid 6).

[55] On our evaluation of the facts before the High Court, we found that there was no proper evaluation of the evidence by the learned judge. This could be gleaned from the following:

(a) The learned judge had accepted the photographs adduced by the plaintiffs' witness, PW1, as evidence despite the fact that PW1 could not determine when and who took those photographs. The High Court had also accepted some of the photographs which were taken after the defect

liability period on 27 April 2006 (See notes of proceedings pp. 200 to 201, p. 226, p. 274 of Ikatan Teras Bersama (Bahagian B) Jilid 1 respectively and p. 1499 to 1503 of Ikatan Teras Bersama (Bahagian C) Jilid 6).

(b) The alleged site inspections of the property was conducted by the plaintiffs after the defects liability period on 27 April 2006, 2014 and 2015 respectively after all the defects had been rectified by the defendant.

(c) The failure on the part of the learned judge to consider the damage to the property could be due to the fact that it was left unattended by the plaintiffs for a couple of years after its completion in 2004.

(d) The survey plan adduced by the PW3 and PW4 could not be relied upon as PW3 had admitted that the measurement in the survey might be wrong. PW4, on the other hand had admitted in evidence that he was not the person who conducted the survey.

(see pp. 242, 253 to 254 & 257 of Ikatan Teras Bersama (Bahagian B) Jilid 1), pp. 1505, 1507 & p. 1509 of rekod rayuan (Bahagian C), p. 10 of rekod rayuan tambahan (Bahagian A)).

[56] Even assuming for one moment that we were wrong in our evaluation of evidence as stated above and the facts disclosed that there was in fact total failure of consideration to warrant a rescission of the SPA, the next issue we have to consider was whether the plaintiffs were still entitled to the relief in the form of a rescission of the SPA, given the facts that the plaintiffs had through their various conduct chosen to affirm the terms of the SPA. In short whether the doctrine of estoppel by conduct would apply to the plaintiff in the instant case.

[57] In order to resolve this issue, we had sought guidance from the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 where the court had stated as follows:

> The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying facts patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[58] The facts as shown in para. 37 were significant to demonstrate to the court that the plaintiffs had exercised their rights pursuant to the SPA to affirm the terms and conditions of the SPA. The plaintiff could not at this stage claim that there was total failure of consideration especially when they had sat on their rights to pursue a claim for rescission. The plaintiff had further exercised their rights under cl. 25(1) to request the defendant to rectify the 160 defects complained in the Complaint Forms No. 01463.

[59] The plaintiffs would therefore be estopped from denying that they had taken vacant possession of the property pursuant to the SPA. The plaintiffs were deemed to have taken vacant possession of the property on 13 October 2004, which was 14 days after receiving the defendant's notice dated 29 September 2004 under cl. 23(4) of SPA.

[60] We had attempted to show various conducts of the plaintiffs as illustrated in para. 54 above and their conduct in approaching the court by way of this action some five years after the property had been completed and vacant possession had been delivered to the plaintiffs, and we were of the view that the plaintiffs by their conduct were estopped from rescinding the SPA.

[61] The issue pertaining to the delay to pursue an action for a rescission of the contract had been delved by the Federal Court in the case of *Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor* [2011] 9 CLJ 133 where the court had held the delay of more than four years before the respondents in that case pursued the action for rescission of contract was fatal. This could be gleaned from the following excerpts of the judgment of the court:

> [23] In the instant appeal, it is a case of a contract for the purchase and sale of property and the contract was completed when the purchaser, ie, the respondents received an executed conveyance and made payment for the purchase price. Since the conveyance has been properly executed by both the appellant and the respondents, we do not think that the latter can recover the purchase monies. Further, there was a delay of more than four years before the respondents decided to pursue the action for rescission
>
> [24] We are of a similar view. We would agree that delay in pursuing an action for the rescission of a contract could be fatal ...
>
> [27] We do not think that the sale and purchase agreement for the property in the instant appeal can be set aside for innocent misrepresentation after it has been completed by conveyance and payment of the purchase money. On the part of the appellant as vendor, it had conveyed the property with a good title and has delivered up actual possession or enjoyment thereof. The respondents as purchasers had accepted the conveyance of the property by taking possession and paying the price. Innocent misrepresentation is no ground for setting aside an executed contract. What has been performed is what was agreed to be performed.
>
> [28] The facts showed that after accepting the keys to the property, the respondents commenced paying the necessary charges payable when one purchases a unit in a condominium, eg, covered car-park charges, fire insurance premium, basic furnishing package, service charges and sinking fund deposit, payments due to Indah Water and assessment due to the Majlis Perbandaran Port Dickson. They even paid for the Admiral Marina

A Club membership amounting to RM14,000 and the ancillary charges payable thereto. These payments totalled RM505,313.27 which was the sum that they claimed from the appellant including the club membership as loss and expense as "the said unit cannot be used and lost its purpose for which the plaintiffs purchased the same".

B [29] We are of the view that such conduct of the respondents discussed above established on their part an election to affirm the agreement. The long lapse of time without complaint showed an intention to affirm the contract and is a strong indication that they were not really persuaded by whatever was said by the appellant's servant or agent as alleged and hence did not amount to misrepresentation inducing the contract.

C **[62]** In *Kris Heavy Engineering & Construction Sdn Bhd v. Mah Sing Properties Sdn Bhd* [2011] 1 LNS 572 the court held as follows:

Even though clause 21 of the Sale and Purchase Agreement provided that time whenever mentioned shall be of the essence of this Agreement, parties by their conduct had abridged the time such that it is too late in D the day for the Plaintiff to terminate the Agreement merely on the ground of the failure of the Defendant to rectify the defects. For support of this proposition one can do no better than to refer to the judgment of his Lordship Raja Azlan Shah J (as His Royal Highness then was) in *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201 where he said:

E Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid: (*Webb v. Hughes* [1870], LR 10 Eq 281, 286 *Stickney v. Keeble* [1915] AC 386, 423). If the defendants F had on the very day of 30 November 1966 ie, the original date for completion, made their stand, their decision would have been that time was of the essence and it would have been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice: (*Tilley v. Thomas* AIR [1928] PC G 523).

[63] In *Kris Heavy Engineering & Construction Sdn Bhd v. Mah Sing Properties Sdn Bhd (supra)* the court has adopted the principles of *Boustead Trading (supra)* as stated in para. 57 above with approval.

H **[64]** Guided by the above high authorities, we were of the view that the remedy of a rescission ought not to be allowed by the High Court as we were satisfied that there was no total failure of consideration. The defendant in the instant case did not refuse or had failed to perform the promise in its entirety. There was overwhelming evidence that the property had been completed and I a certificate of practical completion dated 5 July 2004 and the certificate of fitness dated 29 September 2004 had been issued by the relevant authority.

The property had been registered in the names of the plaintiffs about three years before the filing of the current action. The plaintiffs had not taken any steps to stop the release of the financing from their financier, Maybank and/or the transfer of the property in their names on 12 September 2006, when they knew about the condition of the property very early ie, on 10 November 2004.

[65] In view of the fact that the plaintiffs had not formally rejected the said property and rescinded the SPA at the first opportunity available to them but had instead elected to affirm the SPA by submitting the defects list and threatening to rectify the defects on their own (see p. 871 of Ikatan Teras Bersama (Bahagian C) Jilid 2), we were of the view that the order of rescission made by the learned judge was improper and ought to be set aside by this court.

[66] Further we were of the view, at most given the facts of the instant case the plaintiffs were only entitled to claim for damages for breach of the terms of the SPA and this did not include liquidated damages as the facts showed that there was no delay in surrendering vacant possession to the plaintiffs. The issue pertaining to the 10% liquidated damages of the purchase price did not arise at all, as there was no delay in the delivery of vacant possession to the plaintiffs, the property having been delivered well within the 24 months provided in the SPA. This issue was neither pleaded nor pursued during the trial before the High Court. Hence the award in term of prayer (c) of the originating summons granted by the High Court ought to be set aside.

[67] As for the alleged defects which the plaintiffs complained were due to the various breaches committed by the defendant, we were of the view, at most, the plaintiffs would be entitled to be compensated for the defective works, only if the same had been proven before the High Court. On the evidence placed before us, we found that the plaintiffs had not proven their loss due to the alleged breaches of the SPA as claimed by them. There was insufficient evidence placed before the High Court to prove their loss. We would not delve into the law with regard to damages as the law is trite (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635).

Plaintiffs To Mitigate Their Loss

[68] Further under the law, the plaintiffs herein had a duty to mitigate their losses. This principle had been entrenched in a plethora of cases. In the Supreme Court case of *Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783 at p. 792, His Lordship Mohamed Dzaiddin SCJ (as His Lordship then was) expressed eloquently this principle:

> It is settled principle that the plaintiff is under a duty to take reasonable steps to mitigate the loss consequent to the defendant's wrong and he will not get damages in respect of any part of the loss which is due to his neglect to take such steps (*British Westinghouse Co. v. Underground Ry*

A [1912] AC 673; *Pasuma Pharmacal Corporation v. Mcalister & Co. Ltd* [1964] 1 LNS 132). In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach, to buy or sell in the market, if there is an available market. Even in the absence of an available market, the innocent party must act reasonably to mitigate his
B loss (*Benjamin's Sale of Goods, supra*, para 16-044). The question what is reasonable or whether the plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (*Payzu Ltd. v. Saunders* [1919] 2 K.B. 581, 588; *The Solholt* [1983] 1 Llyods Reports 605 CA).

C **[69]** In *Golden Quantum Acres Sdn Bhd v. SSU Management Services Sdn Bhd* [2014] 10 CLJ 320 the court held as follows:

(g) The cases of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1 and *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 have no bearing on this case because this is not a case
D where the villas were not completed within the stipulated period under the contract. In other words this is not a case relating to delay in the completion of the villas, but is instead a claim for damages arising from a failure of the defendant to construct the building in accordance with contractual specifications. As such the remedy available the plaintiffs is the cost of effecting such repairs to meet contractual specifications as well as
E consequential loss arising for the reasonable time during which the plaintiffs suffer a loss of use of the villas. This latter limb ought to be a reasonable estimate of the time taken to effect repairs.

(h) In this context the plaintiffs are required to mitigate their losses by ensuring that the repairs are effected within a reasonable time. They are
F entitled to be compensated on the basis of an objective and reasonable estimate of the time taken to effect the requisite works. This is not equivalent to a claim for liquidated and ascertained damages, although the quantum so agreed upon may well be a reasonable estimate for the purposes of determining the quantum per day of delay. The plaintiffs' duty to mitigate is well documented in the cases of *Malaysian Rubber*
G *Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 per Dzaiddin SCJ (as he then was) and *Joo Leong Timber Merchant v. Dr Jaswant Singh Jagat Singh* [2003] 5 CLJ 286; [2003] 5 MLJ 116 per Jeffrey Tan J (now FCJ).

[70] In *Lim Chee Yong & Anor v. Lee Boon Su & Anor* [2013] 1 LNS 642 the
H court held:

In *The "Asia Star"* [2010] SGCA 12; [2010] 2 SLR 1154; *The Law Review* [2010] pg. 312-314, VK Rajah JA states that:

The basic rules relating to mitigation are well settled. First the aggrieved party must take all reasonable steps to mitigate the loss consequent on
I the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction (see *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Company of London*

Ltd. [1912] AC 673). Second, the aggrieved party who goes beyond what the law requires of it and avoids incurring any loss at all will not be entitled to recover any damages. In such a case, the aggrieved party's efforts will in effect confer a gratuitous benefit on the defaulting party. Third, the aggrieved party may recover any expenses incurred in the course of taking reasonable steps to mitigate its loss. In short, the aggrieved party cannot recover avoidable or avoided losses; it may, however, recover expenses reasonably incurred in the course of taking mitigation measures ...

[71] In *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232 the Court of Appeal held as follows:

[214] The appellant is duty bound to take all reasonable steps to mitigate the loss suffered consequent upon the respondent bank's purported breach of contract. Yet the appellant did not do so. Viscount Haidane LC in *British Westinghouse Electric And Manufacturing Company, Limited v. Underground Electric Railways Company Of London, Limited* [1912] AC 673, HL, at page 689 aptly said:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[215] Pearson LJ in *Darbishire v. Warran* [1963] 1 WLR 1067, CA, expressed the meaning behind the phrase "duty to mitigate the loss" in these erudite terms (see page 1075):

... it is important to appreciate the true nature of the so-called 'duty to mitigate the loss or 'duty to minimise the damage'. The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.

[72] Guided by the above high authorities and on examination of the facts before us we found that the plaintiffs did nothing to mitigate their loss. The plaintiffs did not seem to be satisfied with the rectification of defects by the defendant and had decided to abandon the said property despite the same had been registered in their names. The plaintiffs ought not to have abandoned the said property but to mitigate their losses by engaging their own contractor to rectify the defects and charging the same to the defendant under cl. 25(1) & (2) of the SPA (see pp. 716 and 717 of Ikatan Teras Bersama (Bahagian C) Jilid 1). One would have better control over one's contractor. The plaintiffs had only themselves to blame for not having occupied the property

and or having maintained it at all for ten years now. The plaintiffs had failed to exercise their rights to mitigate their losses but had allowed the damage to deteriorate due the plaintiffs' own neglect or sheer arrogance.

[73] We were of the view the High Court had erred in granting liquidated ascertained damages of 10% based on the purchase price of RM476,024 as there was no issue of the property being delivered late. The evidence showed that the vacant possession had in fact been delivered well within the timeline provided by the SPA. Looking at the learned judge's order in totality, it would appear that the order for 10% damages for late delivery of the property along with the order for a rescission of the SPA made by the High Court was erroneous and not in line with the accepted principle. Further, these damages were not even pleaded by the plaintiffs in their pleadings and or ventilated before the High Court.

Conclusion

[74] Having examined closely the relevant record of appeal and the documentary exhibits in this case, perused the relevant submissions by both parties we were satisfied that the learned High Court Judge had failed to properly and sufficiently evaluate the evidence adduced before the court. This warranted our intervention.

[75] We are unanimous in our decision. For the reasons set out above, we allowed the defendant's appeal against the decision made by the learned judge dated 23 July 2015 with costs herein and below. The order of the High Court dated 23 July 2015 is set aside. We order for the cost to be subject to allocator and for the deposit to be refunded to the appellant. We now invite parties to make submission on the issue of costs.